United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-6070

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

VARIOUS ARTICLES OF OBSCENE MERCHANDISE
SCHEDULE NO. 1213,

Appellant.

BRIEF FOR CLAIMANT, BERNHARDT J. HURWOOD

ALFRED F. KOLLER, JR.
Attorney for Claimant, Bernhardt J. Hurwood
845 Third Avenue
New York, N. Y. 10022
(212) PLaza 3-8756

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UNITED STATES COURT OF APPEALS

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Docket No. 75-6070

UNITED STATES OF AMERICA,

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v.

VARIOUS ARTICLES OF OBSCENE MERCHANDISE,
SCHEDULE NO. 1213,

Appellant.

ISSUES

The issues presented by this appeal are:

1. Whether Fourth Amendment guarantees against search and seizure apply to international first call mail.

2. Whether opening of international first class mail by customs without the benefit of a search warrant or permission of either addressor or addressee is a permissable search under the constitution and laws of the United States.

3. Whether reasonable grounds existed for searching international first class mail without the benefit of a search warrant, Court order or permission of either sender or addressee.

FACTS

Numerical References
In Brackets Are To
Pages In Appendix

This is an appeal from a final judgment of the United States District Court for the Southern District of New York, Judge Inzer B. Wyatt, duly entered on June 27, 1975.

The case arose as the result of a seizure by the Regional Commissioner of Customs of certain articles of mail [27] which entered the United States from the United Kingdom. The ground for the seizure was that the envelopes contained "goods" which were "obscene, immoral, lewd, lascivious, salacious and patently offensive. . ." and therefore "subject to forfeiture, confiscation and destruction by the plaintiff." [5]

The Commissioner, after seizing a number of articles categorized as obscene, listed these same items on a schedule which bears the number 1213. The addressees of all of the items listed on Schedule 1213 were given notice of the seizure and a scheduled hearing

to determine whether the said items were obscene [9].

The hearing of which the addressees were notified was an *in rem* hearing brought in the name of the United States of America against *Various Articles of Obscene Merchandise, Schedule No. 1213*. At that hearing the only addressee to appear was the claimant, BERNHARDT J. HURWOOD, who was the addressee of Item 4 and 4A on Schedule 1213. With respect to all Items contained on Schedule 1213 except Items 4 and 4A a default judgment was granted to plaintiff. With respect to Items 4 and 4A a hearing was held [11-37] on May 16, 1975 and thereafter a decision was rendered on June 12, 1975, in favor of plaintiff [38a-38b]. Final judgment was entered on June 27, 1975 [39-40] in favor of plaintiff ordering the Items claimed by Bernhardt J. Hurwood to be "forfeited and condemned as obscene". It is from that judgment that this appeal is taken.

Item 4A consists of a sealed international air mail type envelope bearing the name and a mailing address of the addressee-claimant, Bernhardt J. Hurwood, written in longhand. On the back of the said envelope, the name and address of the individual sender, one

Hampton, was also written in longhand [27-28]. (Items 4 and 4A were separated from the Court file on this action, and are now in the possession of the United States Marshal and hence not available for inclusion in the Appendix. Counsel for plaintiff has advised that these items will be offered up to the Court upon the hearing of this appeal.)

Item 4 is the item contained in Item 4A and consists of a one page folder offering various items of merchandise for sale. The obscene nature of Item 4 was not contested by claimant at the hearing and is not an issue raised by claimant on this appeal.

Testimony of plaintiff's witness at the hearing revealed that the sealed envelope addressed to Mr. Hurwood was opened by a customs inspector named Vincent Russi [25]. Mr. Russi did not have any search warrant or Court Order permitting the said items to be opened [28].

The claimant is best described in the words of the Judge below who in his opinion [38a] said:

> "The claimant is a serious and responsible writer who has a professional interest in sex and wishes to have access to all material on the subject. He does not know the sender of the envelope here in question and does not appear to have solicited the mailing."

POINT I

LETTER MAIL IS PROTECTED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

It has long been held by the Courts of this land that first class mail, i.e., letters, are free from inspection by postal authorities except in the manner provided by the Fourth Amendment to the United States Constitution. In his decision in the case of United States v. Van Leeuwen 397 US 249, 25 L Ed 2d 282, 90 S Ct. 1029,(1970) Justice Douglas cited the 1878 case of Ex parte Jackson, 96 US 727, 733, 24 L Ed 877, 879, which held:

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subject to search in one's own household. No law of Congress can place in the hands

> of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution."

Then, in expanding on this theme, Mr. Justice Douglas went on to say that:

> "The course of events since 1878 has underlined the relevance and importance of the Post Office to our constitutional rights. Mr. Justice Holmes in Milwaukee Pub. Co. v Burleson, 255 US 407, 437, 65 L Ed 704, 720, 41 S Ct 352 (dissenting opinion), said that 'the use of the mails is almost as much a part of free speech as the right to use our tongues.' We have emphasized over and over again that while Congress may classify the mail and fix the charges for its carriage, it may not set up regimes of censorship over it, Hannegan v. Esquire, Inc. 327 US 146, 90 L Ed 586, 66 S Ct 456, or encumber its flow by setting 'administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail' to him."

It is of significance that neither the Van Leeuwen case nor the Jackson case limited the scope of their language to mail emanating only from United States sources.

It is also significant that no case was submitted to the Court below for the proposition that the Fourth Amendment guarantees are only applicable to domestic mail.

POINT II

NO STATUTORY AUTHORITY EXISTS FOR OPENING MAIL

Section 4057 of Title 39 of the U.S. Code has read prior to 1970 as follows:

> "Only an employee opening dead mail by authority of the Postmaster General, or a person holding a search warrant authorized by law may open any letter or parcel of the first class which is in the custody of the Department."

That statute appears to clearly have embodied the spirit and plain-faced meaning of the Van Leeuwen and Jackson cases cited in POINT I. In 1970, as part of the reorganization of the Post Office, Title 39 of the U.S. Code was rewritten and the paragraph which replaces Section 4057 is now numbered 3623(d). Under Section 3623(d) the limitation on opening first class mail appears to be limited only to such mail of "domestic origin". It is submitted that the rewording of this statute is not sufficient to grant authority to anyone to open international first class mail. Had it been the legislative intent to permit such opening, such could easily have been provided in positive language. Further, if it was intended that there was to be no more legislated prohibition against opening of first

class mail from outside the country, anyone whether customs official, post office clerk, business competitor or underworld character, would be free to open such mail without fear of sanction.

Appellee contended in the Court below that under 19 U.S.C. 1305 that the Customs Bureau has the right to seize any obscene matter coming into this country whether the same is contained in a first class letter or in a separate package. The statute nowhere mentions seizure of first class mail and specifically says it is applicable to the importation of packages. The pertinent portion reads:

> "No such articles whether imported separately or contained in packages with other goods entitled to entry shall be admitted. . . . ."

However, even assuming the right of the customs authorities to seize matter contained in international first class mail such seizure must be done in accordance with laws and principles of the constitution and applicable statutes. The right to confiscate does not carry with it the license to conduct illegal or unconstitutional or otherwise unauthorized searches. Indeed, this seems to have been the moving spirit

behind Mr. Justice Berger's decision in United States v. 12 200 ft. Reels of Super 8MM Film 413 U.S. 123. At page 129 of that decision he states:

> "While it is true that a large volume of obscene material on microfilm could rather easily be smuggled into the U.S. by mail. . . . Congress is not precluded from barring some avenues of illegal importation because avenues exist that are more difficult to regulate."

The Statute which authorizes Customs officers to make inspection is found at 19 U.S.C. 482. It is respectfully submitted that that Statute which goes into great detail as to what may be searched and where is may be searched does not mention first class mail. It appears obvious that if this Statute was intended to apply to first class mail the Statute would include such a provision.

POINT III

SEARCH BY CUSTOMS OFFICER WAS NOT REASONABLE

The Statute which authorizes Customs officers to make inspection, 19 U.S.C. 482, is broad and places virtually no limit on a Customs officer's right to inspect. This Court in United States v. Doe, 472 F 2d 982 (1973) citing one of its earlier decisions, United States v. Glaziou, 402 F 2d 8 (1968) held that "Border stops and searches, like all stops and searches by public officials are restricted by the requirement that they be reasonable. . . " While that case dealt with a package vis a vis a letter and claimant vigorously objects to its application to first class mail, even the reasonable standards set down in that case has not been met in the case at bar. In the case at bar the Customs inspector, Mr. Russi, testified that the letter in question emanated from Great Britain [27] and that he "would have no way of knowing" from outward appearance that the envelope contained pornographic material [27] which might be subject to seizure. The witness further testified that he had no reason to

believe that the sender was a purveyor of pornographic material and that the only way he could verify that the envelope contained a restricted item is because it came in with numerous other items of mail and "one has to be opened along the line somewhere in order to check it" [28]. It is submitted that a search based only upon such information, is not reasonable within the contemplation of this Statute. It can readily be seen that the inspector's grounds for opening the mail in question was based upon no more than a hunch and was not found upon any facts which might give reasonable or probable cause to suspect the contents of the envelope.

POINT IV

PRECEDENT CASES ARE NOT RELEVANT AND DO NOT COVER ISSUES INVOLVED

There are few cases exactly on point with the issues raised herein. Indeed, the Seventh Circuit in 1974 decided the case United States v. Odland, 502 F 2d 148 as a case of "first impression". For the most part, the search of international mail cases involves searches of packages United States v. Van Leeuwen, 397 U.S. 249, 25 L Ed 282, 90 S Ct. 1029 (1970); United States v. Francis, 487 F 2d 968 (5th Cir., 1973), as opposed to letter type mail. Where the issue has been raised, as in Odland, it has usually been raised as a defense in a criminal action or on a motion to suppress evidence and there has usually been sufficient independent evidence, other than that obtained by or as a result of the mail search, to support the conviction.

Perhaps the closest this Circuit has come to dealing with the issues herein raised is the case of United States v. Doe, 472 F 2d 982 (1973). That case dealt with a package bearing a Customs declaration indicating the contents to be "old clothing" which came into the United States from Columbia. It is respectfully submitted that there is a vast distinction between a

package of the type therein concerned which presumptively contains merchandise of some sort which may or may not be subject to Customs duty or other control and letter mail which is a primary method of communications between two persons. Intrusion upon such international communications by Customs inspector or any other person should not be lightly accepted by the Court. The unfettered opportunity to make such intrusions is an invitation for abuse regardless of how high or worthy the end result may be deemed. It does not demand an imaginative mind to perceive the benefits to be derived by unauthorized persons having access to private correspondence between individuals of this country and other countries. Against this possible harm must be weighed the necessity of such searches in controvention of the constitutional protections. There is no indication that searches of the type herein made are vital or necessary to the preservation of our nation or that they cannot be had by legally authorized means.

CONCLUSION

Judgment of the Court below should be set aside and items 4 and 4A of Schedule No. 1213 should be delivered to claimant, BERNHARDT J. HURWOOD.

ALFRED F. KOLLER, JR.
Attorney for Claimant-
Bernhardt J. Hurwood
845 Third Avenue
New York, New York 10022
(212) PLaza 3-8756

New York, New York
December 5, 1975

Service of three (3) copies of
the within is
hereby admitted this day
of , 197

Attorney for

Thomas J. Cahill (RLP)

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